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TEXAS
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RQ-400

May 21, 1992

The Honorable Dan Morales
Attorney General of Texas
Post Office Box 12548
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Dear General Morales:

A report of our agency's internal auditor raises a question about the application of state law to the payment of expenses for agency-ordered medical examinations in "old law" workers' compensation cases, and we request your opinion on that subject.

Specifically, the proper construction of Article 8307, §4(a) (repealed)[1] is in issue.

> **Article 8307, §4. Rules; Physical examinations; suspension of compensation; procedure and powers**
> **Sec. 4.** (a) The Board may make rules not inconsistent with this law for carrying out and enforcing its provisions, and may require any employee claiming to have sustained injury to submit himself for examination before such Board or someone acting under its authority at some reasonable time and place within the State, and as often as may be reasonably ordered by the Board to a physician or physicians, a chiropractor or chiropractors authorized to practice under the laws of this State. If the employee or the association requests, he or it shall be entitled to have a physician or physicians, chiropractor or chiropractors of his or its own selection present to participate in such examination. Refusal of the employee to submit to such examination shall deprive him of his right to compensation during the continuance of such refusal. When a right to compensation is thus suspended no compensation shall be

[1]While all of Article 8307 was subject to the repealer contained in Chapter 1, Acts of 71st Leg., 2nd C.S.(1989), Section 16.01, the effective date provisions in Subsection 17.18(c) provide that the prior workers' compensation law is continued in force for the purpose of applying to injuries that occurred prior to January 1, 1991, the effective date of the new Texas Workers' Compensation Act, and Subsection 17.18(d) provides for processing claims under the prior law for injuries occurring before January 1, 1991.

payable in respect to the period of suspension. If any employee shall persist in insanitary or injurious practices which tend to either imperil or retard his recovery, or shall refuse to submit to such medical or surgical treatment, chiropractic service or other remedial treatment recognized by the State, as is reasonably essential to promote his recovery, the board may in its discretion order or direct the association to reduce or suspend the compensation of any such injured employee. No compensation shall be reduced or suspended under the terms of this Section without reasonable notice to the employee and an opportunity to be heard. (emphasis added)

We are advised that the position of the Industrial Accident Board in the years before its replacement by the new Workers' Compensation Commission was that §4(a) required the state agency, not the workers' compensation insurance carrier, to pay for agency-ordered medical examinations. In contrast, subsection (b) of §4 expressly provided that insurance carriers were obligated to pay for examinations required by the carriers, and reasonable incidental expenses. **Article 8307, §4(b)** (repealed) reads, in part, as follows:

"The Board shall authorize the examination only after the association [Texas Employers' Insurance Association or other insurance company] has attempted or failed to receive the permission and concurrence of the claimant or his attorney or representative. The association shall pay for such examination and the reasonable expense incident to the injured employee in submitting thereto." (emphasis added)

We are further advised that the IAB legal staff and the Industrial Accident Board had applied the rule of statutory construction of *expresso unius est exclusio alterius*, to conclude that, where the legislature has carefully employed a term in one section of the statute, and has excluded it in another, it should not be implied where excluded. Smith v. Baldwin, 611 S.W. 2d 611 (Tex. 1980). This understanding of the law has continued to be applied by the Texas Workers' Compensation Commission. The TWCC is unaware of any case law or other legal authority expounding upon whose obligation it is under "old law" to pay for agency-ordered medical examinations and incidental expenses. Our internal auditor points out that the "old law" statute did not expressly authorize the IAB (now, the TWCC) to pay for medical examinations ordered by the agency, and questions whether such obligations might properly be the obligation of the particular workers' compensation insurance carriers. The agency believes that the prior state agency statutory construction and practice of payment of agency-ordered examinations out of state appropriations is in conformity with state law. It appears that the 1989 legislative reforms incorporated in S.B.1 expressly changed the law in this point, so that insurance carriers under "new law" are expressly obligated to pay for all agency-required medical examinations and reasonable incidental expenses [see Article 8308-4.16(c)]. We believe that the long-standing IAB/TWCC administrative interpretation of Article

8307, Section 4(a) should be given great weight in these circumstances to support a conclusion that there is implied authority for agency-ordered medical examinations and reasonable incidental expenses to be paid by the agency under "old law", and that insurance carriers are not liable for such payments.

Your opinion on the subject is necessary to resolve the issue raised by our internal auditor, and will allow the TWCC to appropriately administer the "old law" state workers' compensation law for injuries which occurred before January 1, 1991, as required by Article 8308-17.18(d).

We look forward to receiving your opinion on this subject.

Sincerely,

Todd K. Brown
Acting Executive Director

TKB/jbp

cc: Susan Cory, General Counsel
Raj Puri, Internal Auditor

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